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IN THE

Supreme Court of the United States

POINT REYES SEASHORE LODGE, *et al.*,

Petitioners,

v.

HOLLYNN DELIL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there is a compelling reason to grant the Petition where the District Court's unpublished August 9, 2005 "Order Awarding Attorneys' Fees And Costs" and the Ninth Circuit's November 16, 2007 2 page unpublished and non precedent setting Memorandum Opinion do not conflict with opinions of other Courts Of Appeal and do not raise new or important issues for this Court to decide.

2. Whether there is a compelling reason to grant the Petition where the District Court in its *March 24, 2004* Conditional "Order Of Dismissal Upon [Partial] Settlement"retained jurisdiction to vacate the Dismissal Order and to restore the case to the calendar if either party certified within 90 days that settlement had not occurred, where Respondent so certified, and where the Conditional Dismissal Order was vacated and the case restored to the calendar.

3. Whether there is a compelling reason to grant the Petition where the District Court's *March 24, 2004* Conditional "Order Of Dismissal Upon [Partial] Settlement" was not an appealable Order under Federal Rule Of Civil Procedure 54(a) and case law and where, consequently, Federal Rule Of Civil Procedure 54(d)(2)(b) did not require that Respondent file a motion for attorneys' fees.

4. Whether there is a compelling reason to grant the Petition where Petitioner did not assert at any time during the District Court proceedings that the *March 24, 2004* Conditional Dismissal Order required Respondent to file a motion for attorneys' fees.

5. Whether there is a compelling reason to grant the Petition where the parties' and District Court's *July 19, 2004* "Stipulation And Order For Dismissal Of The Injunctive Relief And Damages Aspects Of The Lawsuit" was not an appealable Order under Federal Rule Of Civil Procedure 54(a) and case law and where, consequently, Federal Rule Of Civil Procedure 54(d)(2)(b) did not require that Respondent file a motion for attorneys' fees within 14 days.

6. Whether there is a compelling reason to grant the Petition where, under Federal Rule Of Civil Procedure 54(d)(2)(b) and Northern District Civil Local Rule 54-6, the District Court "otherwise provided" that Respondent was not required to file a motion for attorneys' fees within 14 days from the *July 19, 2004* Stipulation and Order For Dismissal.

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INTRODUCTION

Respondent Hollynn Delil is a person with a disability who requires the use of a wheelchair for mobility.

The underlying civil rights lawsuit which is the subject of Point Reyes Seashore Lodge's Petition involves Ms. Delil's ultimately successful four (4) year odyssey as a "private attorney general" to require that Point Reyes make their upscale California Resort Lodge accessible to persons with disabilities and to recover both the damages she suffered and reasonable statutory attorneys' fees, litigations expenses, and costs. (R 02)

After 30 months of litigation the parties finally were able to settle the injunctive relief and damages aspects of the lawsuit, but not the attorneys' fees aspect, by a Court enforceable "Mutual Release And Settlement Agreement For Injunctive Relief and Damages." Shortly thereafter, the parties submitted to the District Court a "Stipulation And Order For Dismissal Of The Injunctive Relief And Damages Aspects Of The Lawsuit"which also incorporated the court enforceable Mutual Release and Settlement Agreement. The District Court promptly signed the Order in the Stipulated Dismissal as submitted, and it was filed on July 19, 2004.

The parties thereafter were not able to settle the attorneys' fee aspect of the case by negotiation, and consequently Ms. Delil made an attorneys' fee motion to the District Court, which it granted and which the Ninth Circuit affirmed.

Point Reyes argued in the *District Court* that Ms. Delil's attorneys' fee motion was not timely because not filed within 14 days from the *July 19, 2004* Stipulated Dismissal Order .

The District Court rejected Point Reyes' argument.

Point Reyes argued for the *first time* in its appeal to the Ninth Court that a prior, *March 24, 2004* District Court unilateral *Conditiona*l Dismissal was the operative Order governing the time for Ms. Delil to file her motion for attorneys' fees and that Ms. Delil was not entitled to her attorneys' fees because she did not file her motion for fees within 14 days of the March 24, 2004 Conditional Dismissal.

In an unpublished and non precedent setting two (2) page opinion, the Ninth Circuit rejected Point Reyes' arguments and affirmed the District Court's fee award to Ms. Delil.

No matter which Dismissal Order Point Reyes argues, Ms. Delil was not required to file her attorneys' fee motion within fourteen 14 days from either, and consequently there is no compelling reason for this Court to grant Point Reyes' Petition.

Ms. Delil was not required to file a motion for attorneys' fees within 14 days from the District Court's *March 24, 2004 conditional* dismissal order for several *alternative* reasons:

First, the District Court *retained jurisdiction* in the *March 24, 2004* conditional dismissal order for a 90 day period by reason of the following provision in the order:

> ". . . if any party certifies to this court . . . within ninety days from the date hereof that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings." (Pet. App. 16; *see also, e.g, Hagestead v. Tragesser*, 29 F.3d 1430, FN1 and FN4 (9th Cir. 1995); *Muze, Inc. v. Digital on Demand, Inc.*, 356 F.3d 492, 494 (2d Cir. 2004); *Shaffer v. GTE North, Inc.*, 284 F.3d 500, 503-504 (3d Cir. 2002))

Because Ms. Delil did so certify within 90 days, the order was vacated and the cause was restored to the calendar. Consequently, Ms. Delil was not required to file a motion for attorneys' fees.

Second, Fed. Rule Civ. Proc. 54(d)(2)(B) states in relevant part that "Unless otherwise provided by statute or order of the court, the motion [for attorney fees] must be filed no later than 14 days after entry of judgment. Fed. Rule Civ. Proc. 54(a) in turn defines "Judgment" as including ". . . a decree and any **order from which an appeal lies.**" (Emphasis added) In this regard, a conditional dismissal order only becomes final and appealable upon the occurrence of the specified event, in this case the passage of 90 days *without* a certification by either Point Reyes or Ms. Delil that settlement had not occurred. (*see, e.g., Barker v. Craig*, 127 U.S. 213, 215-216, 8 S. Ct. 1175 (1888); *Zucker v. Maxicare Health Plans, Inc.*, 14 F.3d 477, 481-482 (9th Cir. 1994). Because Ms. Delil

in this case certified within 90 days that settlement had not occurred, the conditional dismissal order did not become a final, appealable order. Consequently Ms. Delil was not required to file a fee motion.

Third, by never raising the *March 24, 2004* dismissal order issue in the District Court, Point Reyes waived the issue of whether the March 24, 2004 conditional Dismissal Order governs Ms. Delil's right to attorneys' fees. (*See. e.g., Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868 (1976) and *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882-883 (9th Cir. 2003)

Ms. Delil was not required to file her motion for attorneys' fees within 14 days from the *July 19, 2004* "Stipulation And Order For Dismissal Of The Injunctive Relief And Damages Aspect Of The Lawsuit" and its incorporated, court enforceable settlement agreement for several *alternative* reasons:

First, Fed. Rule Civ. Proc. 54(d)(2)(B)states in relevant part that "Unless otherwise provided by statute or order of the court, the motion [for attorney fees] must be filed no later than 14 days after entry of judgment. Fed. Rule Civ. Proc. 54(a) in turn defines "Judgment" as including ". . . a decree and any **order from which an appeal lies.**" (Emphasis added) In this regard, a Stipulation And Order For Dismissal is not an Order from which an appeal lies. (*See, e.g, Seidman v. City of Beverly Hills*, 785 F.2d 1447, 1448 (9th Cir. 1986)–no appeal from judgment entered pursuant to stipulation; and *Slaven v. American Trading Transp. Co., Inc.*, 146 F.3d 1066, 1070 (9th Cir. 1998)—a party cannot appeal

the approval of a settlement to which it stipulated and did not reserve the right to appeal. Because the July 19, 2004 Stipulated Dismissal Order in this case is not an appealable order, Ms. Delil was not required to file a motion for attorneys' fees within 14 days thereafter.

Second, Ms. Delil was not required to file her motion for attorneys' fees within 14 days from the *July 19, 2004* Stipulation And Order For Dismissal because the District Court "otherwise ordered" pursuant to Fed. Rules Civ. Proc. 54(d)(2)(B), which states in relevant part that "**Unless otherwise provided** by statute or **order of the court,** the motion [for attorney fees] must be filed no later than 14 days after entry of judgment. Fed. Rules Civ. Proc. 54(a) in turn defines "Judgment" as including ". . . a decree and any **order from which an appeal lies.**" (Emphasis added) In this regard, the July 19, 2004 Stipulation And Order For Dismissal and its incorporated court enforceable "Mutual Release And Settlement Agreement" vested the Court with jurisdiction to interpret and enforce the negotiation of, and timing for, any attorneys' fee motion, and the District Court held in its August, 2005 Order Granting Attorney's fees that it had "otherwise provided." (Pet. App. 20; Pet. App. 7-8)

Petitioner Point Reyes has not sustained its burden to provide compelling reasons for this Court to grant its Petition: neither the District Court's unpublished Order granting an award of attorneys' fees nor the Ninth Circuit's unpublished and non precedent setting 2 page memorandum opinion conflict, as Point Reyes erroneously argues, with federal procedural rules or with existing case law from other circuits. Unlike the

cases Point Reyes cites, in this case the District Court's *March 24, 2004* Conditional Dismissal Order did *retain jurisdiction* over the parties' partial settlement for a 90 day period, and the Dismissal Order was vacated and the case restored to the calendar when Ms. Delil certified within the 90 day period that settlement had not occurred. Unlike the cases Point Reyes cites, in this case the Court's July 19, 2004 Stipulation And Order "otherwise provided" under Fed. Rules Civ. Proc. 54(d)(2)(B). Unlike the "final and appealable" judgment cases Point Reyes cites, neither the March 24, 2004 Conditional Dismissal Order nor the July 19, 2004 Stipulation And Order For Dismissal in this case were "final and appealable", which is a condition precedent to the requirement of Fed. Rules Civ. Proc. 54(d)(2)(B) and 54(a) to file a fee motion within 14 days.

STATEMENT OF THE CASE

Ms. Delil's January, 2002 lawsuit in the District Court sought *injunctive relief* to require that Point Reyes make their upscale Lodge accessible to disabled persons, for *damages* for denial of her civil rights, and for reasonable *attorneys' fees*, litigation expenses, and costs. (R1; ER 02)

A. Salient Facts Relating To *Partial* Settlement Of The Injunctive Relief And Damages Aspects Of The Lawsuit

Subject to negotiation and agreement on the terms and provisions of a formal, written Settlement Agreement, at a court settlement conference on March 12, 2004 the parties reached a **partial** settlement of the

injunctive relief and damages aspects of the lawsuit only. (R36; ER343). As part of the settlement, the parties placed on the record that it was a court enforceable settlement agreement and that the District Court would retain jurisdiction.

B. The District Court's March 24, 2004 Conditional Dismissal Order

After the Magistrate Judge who presided at the settlement conference informed the court of a partial settlement, on March 24, 2004, the District Court filed an Order Of Dismissal of the Action, which stated in relevant part:

> "IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE. However, that if any party hereto certifies to this court . . . within ninety days from the date hereof, that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings." (Pet. App.16; R37; ER14)

C. Salient Facts Relating To *Final* Settlement Of The Injunctive Relief And Damages Aspects Of The Lawsuit And To The Unsuccessful Attempt To Settle The Attorneys' Fees Aspect

During the four (4) months from March 13, 2004 to July 12, 2004 counsel for the parties engaged in substantial discussions and negotiations regarding

differences of opinion on numerous injunctive relief scope of work items that remained unresolved following the March 12, 2004 settlement conference, certain terms and provisions of the Settlement Agreement that had not been discussed at the March 12, 2004 settlement conference, and the Stipulation for Dismissal Of The Injunctive Relief And Damages Aspects Of The Lawsuit to be filed with the court. (R64; ER 60, 121-128).

With respect to the attorneys' fees aspect of the lawsuit, On *May 31, 2004* Ms. Delil's counsel and Point Reyes' counsel Michael Brown entered into a "Stipulation For Review And Return Of Plaintiff's Counsels' Time Sheets And Billing Statements"[1]. (R 44; ER 353-355). It states in part:

> "B. Although the parties were not able to settle the amount of attorneys' fees, litigation expenses, and costs to be paid to plaintiff, [at the March 12, 2004 Settlement Conference,] they wish to continue the negotiation process for this last remaining aspect of the lawsuit to be resolved." (R 44; ER353)

Four days later, On June 3, 2004 (shortly before the 90 day period in the March 24, 2004 Conditional Dismissal Order would have run), Ms. Delil's counsel

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1. Ms. Delil had previously entered into a similar Stipulation with Point Reyes prior counsel, Martin Orlick. However, Ms. Delil's counsel and Mr. Orlick did not engage in negotiations to resolve the attorneys' fees aspect of the lawsuit prior to the substitution of Mr. Brown for Mr. Orlick.

filed a "Certification That Settlement of All Aspects of the Lawsuit Have Not Occurred." (R 45 ER 15).[2]

On June 9, 2004 the Court reopened the case and scheduled a case management conference for July 2, 2004. (R46; ER17)

On June 17, 2004 Ms. Delil's counsel and Point Reye's counsel filed their "Updated Joint Case Management Conference Statement." (R 49; ER 18-19) It states in part:

> **"I. STATUS: INJUNCTIVE RELIEF AND DAMAGES ASPECT OF THE CASE**
>
> "The parties have resolved the injunctive relief and damages aspects of the lawsuit by Settlement Agreement and expect that they will e file a dismissal of these aspects of the lawsuit either prior to or shortly after the [July 2, 2004] Case Management Conference." (R 49; ER 19)
>
> **II. STATUS: DAMAGES AND ATTORNEYS' FEES, LITIGATION EXPENSES, AND COSTS**
>
> Plaintiff has made a written demand for her attorneys' fees and has provided plaintiff's counsels' billing statements and daily time

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2. At the time of the Certification, Point Reyes' counsel had not provided Ms. Delil's counsel with the Mutual Release And Settlement Agreement signed by all parties and by him.

> sheets to . . . defendants **recently** substituted in counsel, Michael E. Brown. The parties expect to discuss whether *the amount of attorneys' fees*, litigation expenses, and costs *can be resolved without the need for further involvement by the court. If the parties cannot reach agreement without further involvement, they expect to request that your Honor refer the matter to Judge Chen for a further settlement conference. If the parties cannot reach agreement at such a further settlement conference, plaintiff thereafter will make her motion to the court for attorneys' fees, litigation expenses, and costs.*" (Emphasis added; R 49; ER 19)[3]

On July 13, 2004 the parties filed their "Stipulation and Order [Proposed] For Dismissal of the Injunctive Relief and Damages Aspects of the Lawsuit" with the Court. (Pet. App. 17-20; R 54; ER 22-46). The Court signed the Stipulation and Order as presented, and it was filed on July 19, 2004. (Pet. App. 17-20; R 54 ER22-46). It both incorporates the parties' "Mutual Release And Settlement Agreement For Injunctive Relief And Damages Only" (R 54 ER 22-23) and states in part:

> *"The attorneys' fees . . . aspects of the lawsuit shall be resolved by negotiation or, if*

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3. Contrary to Point Reyes assertion that "The parties had been negotiating the issue of attorneys' fees since March 12, 2004 (Pet.@31), there were virtually no substantive negotiations on the amount of fees prior to July, 2004. In this regard, in its July 6, 2004 Order to Show Cause (R 52), the Court ordered Point Reyes to respond in writing to Ms. Delil's demand for fees. (ER 21; *See, also* R 80, ER 391-393).

unsuccessful, by subsequent motion to the Court"

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"*The Court shall retain jurisdiction to interpret and enforce the* "Mutual Release And *Settlement Agreement* For Injunctive Relief And Damages Only" . . . *and to render a decision on any motion made to the Court for attorneys' fees. . . .*" (Emphasis added; Pet. App. 20; R54; ER 24).

The Settlement Agreement *incorporated* into the July 19, 2004 Stipulation And Order states in part:

"U. The *attorneys' fees* . . . aspects of this Lawsuit . . . *are the subject of continuing negotiation* and litigation. . . . *If the parties are not able to resolve the amount of attorneys' fees . . . by negotiation, Plaintiff will make* a *motion to the Court for attorneys' fees*, litigation expenses, and costs." (Emphasis added; R 54 ER 34-35)

Because the Court administratively had "closed" the case, on August 12, 2004, Ms. Delil's counsel filed a "Certification That Settlement of All Aspects of the Lawsuit Have Not Occurred, Request to Re-open the Case, and Request for the Court to Follow up on its July 6, 2004 Order to Show Cause to Defendants." (R 56 ER 47-49). Ms. Delil's counsel certified ". . . that a

settlement of the attorneys' fees, litigation expenses, and costs aspects of this lawsuit have not occurred" (R56; ER47) and requested ". . . that the Court:

> A. Reopen and restore the case to the calendar.
>
> XXXX
>
> C. *Set a further Case Management Conference for the purpose of determining the future conduct of the remaining attorneys' fees, litigation expenses, and costs aspect of the lawsuit.* (Emphasis added R56; ER48-49)

On August 25, 2004 the District Court issued its "ORDER" in response to the request, stating in part that ". . . *the Court orders that if plaintiff seeks to be* awarded fees and costs, she may apply for same by a regularly scheduled motion, *which the Court will hear and decide.*" (Pet. App. 21-22; R57; ER50; Emphasis added)

The parties thereafter were not able to negotiate a resolution of the attorneys' fee aspect of the lawsuit, and Ms. Delil filed her Motion for attorneys' fees on November 23, 2004. (R 59, 60, 61, 62, 69, 70, 71, 83, and 85).

D. The Parties' Positions At The District Court On The Issue Of The Timeliness Of Ms. Delil's Motion

In their opposition to Ms. Delil's Motion, Point Reyes argued that the Motion was not timely filed ". . . as required by Federal Rule Of Civil Proc. 54(d) and Civil Rule 54-6. . . ." on grounds that Ms. Delil ". . . was required to file her motion within 14 days after the entry of the *July 19, 2004*" Order of Dismissal or, in the alternative, "no later than 14 days after the entry of the Order of *August 25, 2004.*" (Emphasis added; R 73 ER 150-151)

Point Reyes did *not* raise the District Court's March 24, 2004 Conditional Dismissal at any time at the District Court level.

In her Reply to Point Reyes' opposition, Ms. Delil argued she was not required to file her attorneys' fee motion within 14 days of the July 19, 2004 dismissal on alternative grounds, as follows:

1. The July 19, 2004 Stipulation and Order for Dismissal of the Injunctive Relief and Damages Aspects of the Lawsuit Was Not an Order from Which an Appeal Lies. (R 79 ER284-285)

2. Pursuant to statutory authority, the Court "Otherwise Ordered." (R 79 ER 374-375)

3. The Parties' Settlement Agreement and Stipulation and Order for Dismissal

Vested the Court with Jurisdiction to Interpret and Enforce the Negotiation Of, and Timing For, Any Attorneys' Fees Motion. (R 79 ER 376-377)

4. Pursuant to Fed. Rules Civ. Proc. 60(b) (1)-(6), the Court may relieve Ms. Delil from any Order that may have started the running of the 14 day time period (R79 ER 376, fn.4).

In addition, at the April 8, 2005 hearing on her Motion, Ms. Delil advised the Court that ". . . while we believe that the motion was timely filed, . . . if for some reason you don't think it was and rule otherwise, we would be intending to file a Rule 6(b) and/or a 60(b) motion. In response, the Court stated that "I am not going to deny it on the basis of timeliness." (Transcript of Hearing on 4/8/05 at ER 320)

E. The District Court's Order Awarding Attorney Fees To Ms. Delil

In its August 8, 2005 "Order Awarding Attorney's Fees And Costs" of $168,879 (R 86 ER 307-314), the Court rejected Point Reyes position that Ms. Delil was required to file her attorneys' fee motion within 14 days from July 19, 2004:

"Defendants presented a thorough, painstaking and often contentious defense, which required the parties to engage in multiple mediations and other settlement negotiations and substantially extended the

time required to complete the case. (Pet. App. 12; R86; ER312)

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"Even if Rule 54 applies to the circumstances of this case, the Court finds that plaintiff's motion was timely. The rule provides that the motion for fees must be filed within 14 days of entry of judgment, "unless otherwise provided by statute or order of the court." The Court's Order of July 19, 2004 stated that it would retain jurisdiction over rendering a decision on any fees motion. The Order also stated that the parties were to resolve the fees issue by negotiation if possible. Finally, the Court's August 25, 2004 Order stated that plaintiff could seek fees and costs through a regularly scheduled motion.

The Court finds that the August 25, 2004 Order provided that plaintiff was not required to file her motion for attorneys fees and costs within 14 days of the stipulated dismissal, given that the Order was issued more than one month after the dismissal order." (Pet. App. 7-8; R 86 ER 309)

F. Point Reyes' Appeal To The Ninth Circuit

1. The March 24, 2004 Conditional Dismissal

Point Reyes devoted virtually *all* of its appellate brief in the Ninth Circuit to the proposition, *for the first time*, that Ms. Delil's right to an award of attorneys' fees is governed by the District Court's unilateral *March 24, 2004* conditional dismissal order. (Point Reyes opening brief @ pages 2-3 [Issues Presented] and 16-30 [Argument]).

In its unpublished and non precedent setting 2 page Memorandum opinion affirming the District Court's award, the Ninth Circuit determined that the *March 24, 2004 Dismissal Order* was *conditional* and that "When Delil certified that not all aspects of the case had settled, the Order was automatically vacated and the case reopened. (Pet. App. 2).

The Ninth Circuit also found that Point Reyes reliance on *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994), and *Hagestaad v. Tragesar*, 49 F.3d 1430, was misplaced : *Kokkonen* did *not* involve a conditional order and has no application to this case, and in *Hagestaad* the condition for vacating the dismissal was never met because the 90 day deadline had passed. (Pet. App. 2-3)

2. The July 24, 2004 Stipulation And Order For Dismissal

In its unpublished and non precedent setting 2 page Memorandum Opinion affirming the District Court's award, the Ninth Circuit determined that the *July 24, 2004 Stipulation And Order* did not require that Ms. Delil file a motion by August 2, 2004 because the parties' agreement in the Stipulation And Order left the matter of attorneys' fees for resolution by negotiation or subsequent motion to the Court and because the Court's order retained jurisdiction to interpret and to enforce the terms of the settlement agreement and to render a decision on any motion made to the Court for attorneys' fees. Thus, the Court found it ". . . disingenuous for the Lodge to contend that Delil had a duty to file a separate and superfluous motion for fees by August 2, 2004."[4]

REASONS FOR DENYING THE PETITION

Point Reyes has not sustained its burden of providing a compelling reason for this Court to grant its Petition: neither the District Court Order granting an award of attorneys' fees nor the Ninth Circuit Court's unpublished and non precedent setting 2 page memorandum opinion conflict, as Point Reyes erroneously argues, with federal procedural rules or with existing case law from other circuits.

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4. Such a separate fee motion within this time frame would have been superfluous because 1) it would not have had to be made if the parties were able to negotiate a settlement of the attorney fee issue and because 2) it would have to be redone or amended following any unsuccessful negotiation.

Unlike the cases Point Reyes cites, in this case the District Court's *March 24, 2004* Conditional Dismissal Order did *retain jurisdiction* over the parties' partial settlement for a 90 day period, and the Dismissal Order was vacated and the case restored to the calendar when Ms. Delil certified within the 90 day period that settlement had not occurred.

Unlike the cases Point Reyes cites, by its conduct and by not asserting in the District Court proceeding in this case that the *March 24, 2004* Conditional Dismissal Order required that Ms. Delil file a motion for attorneys' fees, Point Reyes has waived the right to assert the issue on appeal.

Unlike the cases Point Reyes cites, the *March 24, 2004* Conditional Dismissal Order in this case was not a final and appealable order, which is a condition precedent to the requirement of Fed. Rules Civ. Proc. 54(d)(2)(B) and 54(a) to file a fee motion within 14 days.

Unlike the cases Point Reyes cites, in this case the Court's *July 19, 2004* Stipulation And Order "otherwise provided" in accord with Fed. Rules Civ. Proc. 54(d)(2)(B) and Local Rule 54-6.

Unlike the cases Point Reyes cites, the *July 19, 2004* Stipulated Dismissal Order in this case was not a final and appealable order, which is a condition precedent to the requirement of Fed. Rules Civ. Proc. 54(d)(2)(B) and 54(a) to file a fee motion within 14 days.

I. Point Reyes Has Not Provided A Compelling Reason To Grant The Petition Because Ms. Delil Was Not Required To File A Motion For Attorneys' Fees From The District Court's *March 24, 2004* Unilateral And Conditional Dismissal Order

A. Ms. Delil Was Not Required To File A Motion For Attorneys' Fees Because The District Court Retained Jurisdiction In The March 24, 2004 Conditional Dismissal Order To Vacate The Order And Restore The Case To The Calendar If, As Ms. Delil Did, A Party Certified Within 90 Days That Settlement Had Not In Fact Occurred

A District Court may retain jurisdiction to set aside or vacate a Conditional Dismissal Order. (*see, e.g., Hagestead v. Tragesser*, 29 F.3d 1430, FN4 (9th Cir. 1995) In *Hagestaad*, the district court unilaterally dismissed the case upon being advised of a settlement with the condition it would be set aside for good cause shown if the settlement was not consummated within 90 days. In *Hagestead* the Ninth Circuit determined that the Court had retained jurisdiction over the 90 day reservation to set aside the dismissal if the settlement was not consummated (@ FN1 and FN4). (*See also, Muze, Inc. v. Digital on Demand, Inc., supra,* and *Shaffer v. GTE North, Inc., supra,* each discussing conditional dismissals in which the court *retained jurisdiction* to reinstate the case).

Here, the District Court's Dismissal Order likewise retained jurisdiction by stating in the Order that it ". . . shall be vacated and this cause . . . restored to the calendar for further proceedings" if any party certifies to the court within 90 days that the settlement has not

occurred. Ms. Delil having so certified, the Order was vacated and the case restored to the calendar.

Not only is Point Reyes' position that the District Court's March 24, 2004 conditional dismissal was a final order which terminated the litigation and divested the court of jurisdiction at odds with the District Court's conditional dismissal order itself retaining jurisdiction, it also is at odds with Point Reyes' conduct during the entire District Court proceedings during the 17 months from the March 24, 2004 dismissal order through the August 9, 2005 District Court decision on Ms. Delil's motion for attorneys' fees.

- On *May 31, 2004*, more than two months after the March 24, 2004 Conditional Dismissal Order, Ms. Delil's counsel and defendant Point Reyes Seashore Lodge's counsel, Michael Brown, entered into a Stipulation for review of plaintiff's counsels time sheets as part of the agreed upon of process of attempting to negotiate and agreement on the amount of attorneys' fees to be paid by Point Reyes.

- On *June 17, 2004*, Ms. Delil's counsel and Point Reyes' counsel Mr. Brown advised the Court in their Joint Case Management Statement that they expected to discuss whether the amount of attorneys' fees could be resolved without further involvement by the Court; that they expected to ask the

Court to refer the matter of attorneys' fees to Judge Chen for a further settlement conference if they could not reach an agreement without further Court assistance; and that if they could not reach agreement at a further settlement conference that Ms. Delil *thereafter* would make her motion to the Court for attorneys' fees.

- The July 19, 2004 "Stipulation And Order For Dismissal of the Injunctive Relief And Damages Aspects Of The Lawsuit" filed with Court on *July 13, 2004*[5], which Order the Court signed unchanged, states that "The attorneys' fees, litigation expenses, and costs aspects of the lawsuit shall be resolved by negotiation or, if unsuccessful, by subsequent motion to the Court."

- Point Reyes did not assert in its opposition to Ms. Delil's attorney fee motion in the District Court that the March 24, 2004 Dismissal Order began the time running for Ms. Delil to file her fee motion.

Point Reyes' conduct leaves no doubt but that it did *not* consider that the *March 24, 2004* conditional

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5. Defendants' counsel Michael Brown did not sign and provide Ms. Delil's counsel the Stipulation And Proposed Order For Dismissal until July 12, 2004, and that is why neither it nor its incorporated Mutual Release And Settlement Agreement was filed with the District Court at an earlier date (R 54 ER 22-23)

dismissal order began the running of a time period for Ms. Delil to file a motion for attorneys' fees.

B. Point Reyes Has Waived the Right to Argue That the March 24, 2004 Conditional Dismissal Order Began The Time For Ms. Delil To File a Motion for Attorney Fees

Federal appellate courts generally will not consider an issue that was not raised or passed upon at the district court level (*Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868 (1976); *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882-883 (9th Cir 2003). The basic reason for the appellate court's unwillingness to consider an issue for the first time on appeal is ". . . to ensure that legal arguments are considered with the benefit of a fully developed factual record, offer appellate courts the benefit of the district court's prior analysis, and prevent parties from sandbagging their opponents with new arguments on appeal." (*Dream Palace v. County Of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004)

While it does not appear that there is a hard and fast rule to determine whether a matter has been properly raised in the district court, "A workable standard . . . is that the argument must be raised sufficiently for the trial court to rule on it." (*Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992)

Because Point Reyes never took the position at the district court level that the March 24, 2004 conditional dismissal order began the time running for Ms. Delil to file a fee motion, it has waived the right to make the argument to this Court.

C. Ms. Delil Was Not Required To File A Motion For Attorneys' Fees Because The Conditional Dismissal Was Not A Final And Appealable Order

Fed. Rules Civ. Proc. 54(d)(2)(B) states in relevant part that "Unless otherwise provided by statute or order of the court, the motion [for attorney fees] must be filed no later than 14 days after entry of **judgment.**" Fed. Rules Civ. Proc. 54(a) in turn defines "Judgment" as including ". . . a decree and any **order from which an appeal lies.**" (Emphasis added) A dismissal order that is **conditioned** on the occurrence or nonoccurrence of a future event becomes final and appealable only upon occurrence or nonoccurrence of the specified event (*Barker v. Craig*, 127 U.S. 213, 215-216, 8 S. Ct. 1175 (1888); *Zucker v. Maxicare Health Plans, Inc.*, 14 F.3d 477, 481-482 (9th Cir. 1994).

Here, the District Court's unilateral March 24, 2004 dismissal order was a **conditional** dismissal order. This conditional dismissal stated that ". . . if any party hereto certifies to this court . . . within ninety days from the date hereof, that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings."(Pet. App. 16; R37; ER 14)

Ms. Delil's counsel certified prior to the expiration of the ninety day period that settlement of all aspects of the case had not occurred (R 64; ER60, 121-128; R45);

ER15).[6] Prior to the expiration of the ninety day period, on June 9, 2004, the March 24, 2004 conditional Dismissal Order was vacated by the reopening of the case and scheduling a case management conference for July 2, 2004 (R46; ER 15; page 16.)

Because the March 24, 2004 Conditional Dismissal Order never became a final, appealable order, Ms. Delil was not required to bring a motion for attorneys' from the March 24, 2004 Conditional Dismissal Order.

D. Point Reyes' Cited Statutes And Cases with Respect to the March 24, 2004 Conditional Dismissal Order Are Either Inapplicable or Distinguishable

Citing numerous statutes and cases, Point Reyes' *erroneously* argues that *every* dismissal with prejudice is a final and appealable order that terminates the litigation and divests the court of jurisdiction (Pet. @ 22-23, citing *Glick v. Ballentine Produce, Inc.*, 397 F.2d 590 (8th Cir. 1968), dismissal based on pleading failing to state a cause of action; *Schwarz v. Folloder*, 767 F.2d 125 (5th Cir. 1985), dismissal at plaintiff's request pursuant to 41(a)(2); *Flood v. Harrington*, 532 F.2d 1248 (9th Cir. 1976), dismissal for summary judgment; and *Krull v. Celotex*, 827 F.2d 80 (7th Cir. 1987), dismissal for summary judgment).

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6. *See, e.g., Hagestead v. Tragesser*, 29 F3d 1430 (9th Cir. 1995) for a case with a similar conditional dismissal order with a 90 day set aside time frame which, unlike here, became final after 90 days because the condition which would have prevented finality within the prescribed time frame did not occcur.

None of Point Reyes cited cases deal as here, with a conditional dismissal order in which the Court retained jurisdiction to vacate the dismissal order and restore the case to the calendar, and none of the Point Reyes' cited cases deal, as here, with a conditional dismissal whose finality, by it terms, is dependent on the occurrence or non occurrence of a condition (*See* I A and C, *supra.*)

Citing *Weldon v. United States*, 196 F.2d 874, 875-876 (9th Cir. 1952), *Calhoun v. United States*, 647 F.2d 6 (9th Cir. 1981), and *Bailey v. Potter*, 478 F.3d 409, 412 (D.C. Cir. 2007), Pt. Reyes *erroneously* argues, *for the first time to this Court*, that the March 24, 2004 dismissal order complied with the requirements of *Fed. R. Civ. Proc. 58(a)* and consequently was a "final order" when entered on the docket under Fed. R. Civ. Proc. 79(a). (Pet. @23, 26-27) However, *Weldon*, *Calhoun*, and *Bailey* only deal with whether an appeal was taken from an order which met the requirements of Fed. R. Civ. Proc. 58(a)and 79(a): those cases do not hold that every order that complies with Fed. R. Civ. Proc. 58(a)and 79(a) is final and appealable or that the court lacks the power to retain jurisdiction to vacate the order if a condition specified in the order does, or does not, occur.

Moreover, in determining whether a dismissal order is final and appealable or whether it terminates the litigation and divests the court of jurisdiction, it is important to ascertain the District Court's intent. A dismissal order is final and appealable only if it is a full adjudication of the issues and clearly evidences the judge's intention that it be the court's final act in the matter (*National Distrib. Agency v Nationwide Mur.*

Ins. Co., 117 F.3d 432, 433 (9th Cir. 1997). A District Court's dismissal order is not a final, appealable order unless the circumstances clearly indicate that the court intended to terminate the litigation. (*Knevelbaard Dairies v. Kraft Foods*, 232 F.3d 979, 983 (9th Cir. 2000). In evaluating the District Court's intent, "We [the appellate court] look beyond the dismissal order and read the entire record, including the District Court's action subsequent to filing of the order, to determine what effect the court intended its order to have." (*Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 870 (9th Cir. 2004); *Montes v. United States*, 37 F.3d 20, 22 (9th Cir. 1996)). Here, a record review reveals that the Court's intent, as stated in the dismissal order itself and confirmed by the Court's subsequent conduct, was for the March 24, 2008 Order to be vacated and the cause restored to the calendar if either party, as here occurred, certified within 90 days that settlement had not occurred and for the order to be final and appealable only if 90 days passed without a certification such as Ms. Delil made.

Citing *Keeling v. Sheet Metal Workers International Assn.*, 937 F.2d 408 (9th Cir. 1991), Point Reyes *erroneously* argues that the March 24, 2004 conditional dismissal "... was merely placing all parties on notice ... that the Court would consider the failure to consummate the settlement within 90 days "good cause" to vacate the dismissal pursuant to a motion filed in accordance with Fed. R. Civ. Proc. 60(b) ..."(Pet. @24). There is nothing in *Keeling*, a case in which the Sheet Metal Union made a Rule 60(b)(6) motion, that provides "notice" or otherwise suggests that a party such as Ms. Delil must make a Rule 60 (b)(6) motion rather than

follow the specific instructions in the conditional dismissal order within 90 days to have the order vacated and the case to restored the active calendar. To the contrary, the March 24, 2004 dismissal order unequivocally states that upon happening of the condition the ". . . order shall be vacated ." Moreover, Fed. R. Civ. Proc. 60(b) applies only to final judgments or orders, which the March 24, 2004 conditional order was not.[7] Consequently, Ms. Delil not only was not on "notice" to make a Fed. R. Civ. Proc. 60(b) motion, she was precluded from doing so. Even if one were to construe the March 24, 2004 dismissal as a final, appealable order, the "shall be vacated" and "restored to the calendar" language upon the certification that settlement has not occurred, together with restoring the case to the calendar upon the certification, is sufficient to comply with Fed. Rule Civ. Proc. 58(a) and 79(a).

II. Point Reyes Has Not Provided A Compelling Reason To Grant The Petition Because Ms. Delil Was Not Required To File A Motion For Attorneys' Fees Within 14 Days From The *July 19, 2004* Stipulated Dismissal Order

A. The *July 19, 2004* Stipulated Dismissal Order Is Not An Order From Which An Appeal Lies

Fed. Rule Civ. Proc. 54(d)(2)(B) states in relevant part that "Unless otherwise provided by statute or

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7. Point Reyes also argues that *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-255 (1988) supports its position that the March 24, 2004 dismissal cannot be vacated because it is contrary to the application and construction of Fed. R. Civ. Proc. 60(b).(Pet.@ 27) *Bank Of Nova Scotia* has nothing to do with Fed. R. Civ. Proc. 60(b) or the issues in this case.

order of the court, the motion [for attorney fees] must be filed no later than 14 days after entry of **judgment.**[8] Fed. Rules Civ. Proc. 54(a) defines "Judgment" as including ". . . a decree and any **order from which an appeal lies.**"

Here, the July 19, 2004 "Stipulation And Order For Dismissal Of The Injunctive Relief And Damages Aspects Of The Lawsuit" does not fall within the "Judgment" definition of an "order from which an appeal lies." Neither Ms. Delil nor Point Reyes could take an appeal from their Stipulation and Order and the Settlement Agreement incorporated by reference in the Stipulation as if set forth in full (*see, e.g., Seidman v. City of Beverly Hills*, 785 F.2d 1447, 1448 (9th Cir. 1986)–no appeal from judgment entered pursuant to stipulation; *Slaven v. American Trading Transp. Co., Inc.*, 146 F.3d 1066, 1070 (9th Cir. 1998)—a party cannot appeal the approval of a settlement to which it stipulated and did not reserve the right to appeal; and *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994)–unequivocal agreement with trial court's procedure precluded objection on appeal).

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8. Local Civil Rule 54-6 likewise provides for the 14 day period after entry of judgment. The reason for the 14 day requirement is because the losing party has only 30 days to file a notice of appeal, and an attorneys' fees motion may influence the decision of the losing party as to whether it wishes to appeal the judgment. Here, Point Reyes knew the amount of attorneys' fees that Ms. Delil was seeking at the time of the July 19, 2004 Stipulated Dismissal Order and knew that Ms. Delil would file a fee motion if the parties could not otherwise agree on an amount through the negotiation process or through mediaiton.

Here, the July 19, 2004 Stipulated Dismissal Order and incorporated Settlement Agreement recite precisely what injunctive relief work has to be performed and exactly the amount of damages that has to be paid (R 54 ER 26-30). Moreover, the incorporated settlement agreement provides that "The attorneys' fees . . . are the subject of continuing negotiation . . . in the lawsuit . . ." and that "If the parties are not able to resolve the amount of attorneys' fees by negotiation, . . . Plaintiff will make a motion to the court for attorneys' fees." The parties having so agreed in their settlement agreement, the parties have so stipulated, and the Court having so Ordered, there simply is nothing that Point Reyes could appeal. Consequently, the 14 day time period to file a motion for attorneys' fees did not begin to run.

B. The July 19, 2004 Stipulated Dismissal Order "Otherwise Provides"

Fed. Rules Civ. Proc. 54(d)(2)(B) states in relevant part that "**Unless otherwise provided by . . . order of the court**, the motion [for attorney fees] must be filed no later than 14 days after entry of judgment." (Emphasis added)

Here, the District Court in its July 19, 2004 Order of Dismissal "otherwise provided by Order." It states in part:

> "The attorneys' fees, litigation expenses, and costs aspects of the lawsuit shall be resolved by negotiation or, if unsuccessful, by subsequent motion to the Court.

> The Court shall retain jurisdiction to interpret and to enforce the terms of the "Mutual Release And Settlement Agreement For Injunctive Relief And Damages Only' incorporated by reference herein and to render a decision on any motion made to the Court for attorneys' fees, litigation expenses, and costs."[9]

The District Court's subsequent August 25, 2004 Order and August 8, 2005 Order awarding attorneys' fees confirms that the Court did "otherwise order." (Statement Of The Case, C, D, and E, supra) Consequently Ms. Delil was not required to file a fee motion within 14 days from the July 19, 2004 Stipulated Dismissal Order.[10]

C. Point Reyes' Cited Statutes And Cases with Respect to the July 19, 2004 Stipulated Dismissal Order Are Either Inapplicable or Distinguishable

Point Reyes *erroneously* argues that the District Court decision in this case is contrary to the 14 day time

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9. This language was in the Order provided to the Court by the parties and was adopted by the Court without change.

10. Nor would Ms. Delil have only 14 days from August 25, 2004 to file her motion. The August 25, 2004 Order is not subject to the 14 day time requirement of Fed. Rules Civ. Proc. 54(d) for the same reasons that the July 19, 2004 Order is not so subject: because it is an order in which the Court "provided otherwise" and because it is not an Order from which an appeal can be taken.

period decisions in *Bender v. Freed*, 436 F.3d 747 (7th Cir. 2006), *IPXL Holdings, LLC v. Amazon.Com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005) and *Tancredi v. Metropolitan Life Ins. Co.*, 378 F.3d 220 (2d Cir. 2004), *cert. denied*, 539 U.S. 942 (2003) (Pet. @ 30, 34, 36, and 37, footnote 11, 38, and 39).

First, the 14 day time period began to run in the summary judgment cases of *Bender* and *IPXL* and the dismissal for failure to state a claim case of *Tancredi* because they *were* final judgments and orders from which an appeal lies. In this Stipulated Dismissal Order case, the July 19, 2004 Dismissal Order is *not* a final Order from which an appeal lies and consequently did not begin the 14 day time period. (IIA, *supra*)

Second, the 14 day time period did not begin to run in this case because, unlike *Bender*, *IXPL*, and *Tancredi*, the July 19, 2004 Stipulated Dismissal Order in this case "otherwise provided." (II B, *supra*).

Point Reyes also *erroneously* argues that Ms. Delil did not fulfill her "duty" to comply with Local Rule 54-6, which states that "Unless otherwise ordered by the Court after a stipulation to enlarge time under Civil L.R. 6-2 . . . , motions for awards of attorneys' fees by the Court must be served and filed within 14 days after judgment. . . ." (Pet. @35-36)

First, the July 2004 Stipulated Dismissal Order is not a final Order from which an appeal lies and consequently Civil Local Rule 54-6 does not apply and its 14 day time period did not begin to run. (IIA, *supra*)

Second, assuming arguendo that Civil Local Rule 56-4 does apply, the District Court held that it had "otherwise ordered" in the parties' Stipulated Dismissal Order which the District Court signed (IIB, supra.) Moreover, with respect to the fact that a declaration prescribed under Local Rule 6-2 did not accompany the July 19, 2004 Stipulation And Order, Fed. Rule Civ. Proc. 83 states in part:

Rule 83. Rules by District Courts; Judge's Directives

> (a)(2) A local rule imposing a requirement of *form* shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement." (Emphasis added).

Here, local rule 6-2(a) upon which Point Reyes relies is entitled **form** and content and is subject to Fed. Rule Civ. Proc. 83, and any failure to file a declaration was merely one of **form** that was not willful.

CONCLUSION

Because the District Court's March 24, 2004 unilateral Conditional Dismissal was not a final, appealable order, and because the District Court retained jurisdiction to vacate the Order upon either parties' certification within 90 days that the settlement had not occurred, Ms. Delil was not required to file a motion for attorneys' fees. In any event, Point Reyes waived the issue of whether the March 24, 2004 Conditional Dismissal Order governs whether Ms. Delil

timely filed her motion for attorneys' fees both by its conduct and its failure to raise the issue at the District Court level.

Pursuant to the parties' July 19, 2004 Stipulated Dismissal Order and applicable law, Ms. Delil's was not required to file her attorneys' fee motion within 14 days 1) because the Stipulated Dismissal Order was not an order from which an appeal lies and 2) because the Stipulated Dismissal Order "otherwise provided."

Neither the District Court Order granting an award of attorneys' fees nor the Ninth Circuit's unpublished and non precedent setting 2 page memorandum opinion conflict with federal procedural rules or with case law from other circuits.

Because there is no compelling reason to grant it, Ms. Delil respectfully requests that the Court deny Point Reyes' Petition for Writ of Certiorari.

Respectfully submitted,

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